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TO : Luana Reyes  
Acting Deputy Director for Headquarters Operations

FROM : Barbara Hudson, Attorney  
Office of the General Counsel

SUBJECT : Contract Support Costs

During the National Self-Governance Pre-Negotiation Meeting, the issue of contract support costs was discussed in detail. Based on the discussion, you asked the Office of the General Counsel (OGC) to answer the two questions set forth below.

I. Question 1 - Does the law require the agency to pay contract support costs in addition to tribal shares?

A. Title III - Section 303(a)(6)

Section 303(a)(6) states that self-governance tribes shall receive payment equal to the amount which the they would have been eligible to receive under contracts and grants under the Indian Self-Determination Act ("the Act"). However, section 306 states that nothing in the Act may be construed to limit or reduce funds that any other tribe is entitled to receive. Keeping section 306 in mind, we now examine the amount a tribe would have received under a Title I contract.

B. Title I - Section 106(a)(1)

Sections 106(a)(1), (2), and (3) set forth the amount of funds which tribes receive under Title I. The total amount which a tribe may receive may be broken down into three amounts: direct program costs, tribal shares, and contract support.

Section 106(a)(1) essentially provides that a tribe shall receive not less than the Secretary would have otherwise provided for the operation of the program. Section 106(a)(1) also states that the amount provided to a tribe is to be determined without regard to any organization level within the Department at which the program, function, service, or activity (including supportive administrative functions) is operated. Such amount often is referred to as "tribal shares". In other words, the tribe takes "its share" of certain headquarter and area office functions that support the contracted program. Thus, we accept the proposition that area and headquarters tribal shares are funded under section 106(a)(1).

C. Title I - Section 106(a)(2)

Section 106(a)(2) states--

There shall be added to the amount required by paragraph 1 contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which--

(A) normally are not carried on by the respective Secretary in his direct operation of the program;  
or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(Emphasis added). Section 106(a)(2) uses the word "shall". Therefore, the addition of contract support is a Congressional mandate. However, this mandate is qualified by Category (A) and Category (B). Category (A) consists of costs for things that the Secretary normally would not do in carrying out the program directly. By definition, these are things that the tribe would not receive funding for under section 106(a)(1) because the Secretary does not carry them out. For example, while the Federal Government self-insures, the tribe may have to carry certain insurance. Therefore, the tribe would be eligible to receive

contract support for such costs under Category (A). In other words, a tribe that contracts for a program under the Act would be eligible to receive funding for those contract support costs that fall within Category A.

With respect to Category (B), funding for contract support is linked to activities which the tribe must carry out but which "are provided by the Secretary in support of the contracted program from resources other than those under contract". (Emphasis added). Thus, the extent to which a tribal organization includes funding for area and headquarters administrative support functions under section 106(a)(2) has a direct bearing on the availability of contract support under Category (B). Including the full tribal share of area and headquarters administrative support functions in the contract under section 106(a)(1) necessarily would reduce the types of activities for which contract support is available under Category (B).

In other words, in providing for contract support in Category (B), Congress recognized that a tribe will have to carry out similar types of activities in support of the contracted program that the Secretary carried out. While not all of these support activities may be part of the contracted program, we note that as more of these support activities are contracted as tribal shares of area and headquarters operations under section 106(a)(1), there will be fewer types of activities that will qualify for contract support under Category (B) of section 106(a)(2).

Essentially, as the amount provided under tribal shares in section 106(a)(1) increases, the amount the Secretary provides from sources outside the contract (Category (B)) decreases. We note that there may not be a dollar-for-dollar correlation. While section 106(a)(1) is based on what the Secretary would allocate for the activity, section 106(a)(2) is based upon reasonable tribal need.

At this point, an example may be helpful. Let's assume that the tribal share of headquarters functions is \$2,000 and the tribal share of area office functions is \$5,000. If a tribe decides to take its tribal share of the area office but not headquarters functions, then the activity which the \$2,000 headquarter's amount supports would fall within Category (B), i.e., it is an amount provided by the Secretary from sources other

than under the contract. However, if the tribe takes its share of headquarters and area office functions, then the amount the Secretary provides under Category (B) would be reduced.

D. Title I - Section 106(a)(3)

The relationship between contract support under section 106(a)(2) and funding under section 106(a)(1) is reinforced by new section 106(a)(3). Section 106(a)(3) provides that while eligible contract support may include direct and overhead funding, such funding shall not duplicate any funding provided under section 106(a)(1). In avoiding any duplication of funds, the agency should consider the relationship between section 106(a)(1) and section 106(a)(2). In the above example, if the agency provides the tribal share of \$2,000 under section 106(a)(1) and \$2,000 for contract support under Category (B) of section 106(a)(2), the tribe has received duplicate funding in violation of section 106(a)(3).

E. Title I - Section 106(b)

Section 106(b) states that the provision of funds under the Act, which would include contract support costs, is subject to the availability of appropriations. In addition, this section also provides that the Secretary is not required to reduce funding for programs serving one tribe in order to make funds available to another tribe. Further as noted above, section 306 states that the agency may not increase funding for one tribe at the expense of another tribe.

The funding for headquarters and area offices essentially is composed of (1) residual, i.e., an amount associated with inherently Federal functions, and (2) tribal shares. Absent a specific fund for contract support costs, the source of funds for contract support would come from one of these categories. Because the amount for residual is inherently Federal, any funding for contract support costs necessarily would have to come from tribal shares. However, such action would violate section 106(b) because it would reduce the funding available for other tribes. Therefore, the agency may face a shortage of funds to pay contract support costs if

increased appropriation for contract support costs are not sufficient to meet tribal needs.

The provision in section 106(c)(2) requires the agency to report to Congress any deficiency of funds needed to provide contract support costs. Thus, Congress clearly anticipated that the agency might not be able to fund the total amount of contract support costs for which tribes were eligible.

#### F. Conclusion

In conclusion, we believe that Congress has mandated the provision of contract support costs. While the law may mandate the payment of contract support costs, the functions associated with such costs must fall within the criteria set forth in Category (A) or Category (B) under section 106(a)(2).

Further, if increased appropriations for payment of contract support costs do not meet tribal needs, it is unlikely that the agency can provide such funding without reducing the funding for other tribes. The source for such funding for contract support costs would have to come from other funds available to the agency, i.e., residual or tribal shares. However, if Congress provides appropriations specifically for contract support, the agency could pay contract support costs from such funding without violating section 306 or section 106(a)(3)(A)(ii).

### II. Question 2 - Is IHS's recommended policy contrary to any applicable law?

#### A. Recommended Policy

It is the policy of the Indian Health Service that Title I and Title III tribes whose Secretarial amounts include area/headquarters tribal shares shall be entitled to receive contract support costs on all portions of those amounts, including on all portions of the area/headquarters tribal shares.

## B. Statutory Constraints/Suggested Revision<sup>1</sup>

As noted above, the statute provides certain constraints on the payment of contract support costs. First, the amount available for contract support costs is subject to appropriations. Second, payment of contract support may not reduce funding available for other tribes. Third, the amount of contract support costs must consider the interrelationship between section 106(a)(1) and section 106(a)(2)(B). Because the policy as written may violate certain statutory provisions, we would recommend that the proposed policy be revised as follows:

Based on section 106(a)(2), it is the policy of the Indian Health Service that Title I and Title III tribes whose Secretarial amounts include Area/Headquarters tribal shares may receive contract support costs as defined in section 106(a)(2) and (3). ~~on all portions of these amounts, including on all portions of the Area/Headquarters tribal shares.~~ Funding of contract support costs is subject to appropriations, and consistent with section 106(b) and section 306, the agency will not reduce funding for a particular tribe in order to pay contract support costs to another tribe. Funds for contract support costs must be specifically appropriated by Congress. The amount provided for contract support must be associated with a function not normally carried out by the

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<sup>1</sup>We have not specifically addressed section 106(d) because we believe that it is not directly applicable to the questions asked. Section 106(d) discusses calculation of the indirect cost rate. Under section 106(d) tribes are not held liable for shortfalls in indirect cost recoveries through the practice of assessing "theoretical" recoveries. Prior to the enactment of this section, the Office of the Inspector General (OIG) held tribes liable to collect full indirect costs even though they did not actually receive full reimbursement in many cases. Section 106(d) precludes this OIG practice by clearly stating that "such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future year's indirect cost rate ... nor shall any agency seek to collect such shortfall from the tribal organization." We do not believe anything in this opinion is contrary to section 106(d).

Department or with a function supported by funds from resources other than those under the contract. The amount provided for contract support costs may not duplicate funding received under section 106(a)(1) of the Act.

We hope this information is helpful to you. If you need further clarification, please give me a call at 443-0406.

A handwritten signature in cursive script that reads "Barbara Hudson".

Barbara Hudson